JAN 19 2001

No. 99-1994

Supreme Court, U.S.
FILED
JAN 19 2001
CLERK

In The

Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,

Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS THE TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES AND THE HONORABLE JOSEPH VAN WALRAVEN IN RESPONSE TO BRIEF FOR PETITIONERS

KIM JEROME GOTTSCHALK
Counsel of Record
MELODY MCCOY
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

January 19, 2001

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a tribal court has jurisdiction over civil suits brought by a tribal member against state game wardens in their individual capacities, for alleged illegal and tortious conduct by the wardens arising out of the execution of search warrants on the member's trust allotment land within the tribe's reservation.

2. Whether immunity defenses that may be available to the game wardens, who have been sued in tribal court in their individual capacities, should be adjudicated by the tribal court prior to any federal court intervention.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. INTRODUCTION 9

II. THE TRIBE HAS INHERENT JURISDICTION OVER THE ACTIONS PENDING IN TRIBAL COURT 12

A. Tribes Have Inherent Jurisdiction Over Their Members And Their Territory 12

B. The Presumption Of Inherent Tribal Jurisdiction Governs This Case Arising On Indian Trust Land 16

C. Alternatively, Assuming *Arguendo* That The *Montana* Conditions For Tribal Jurisdiction Over Non-Indian Conduct On Non-Indian Fee Land Must Be Met In This Indian Trust Land Case, The Conditions Are Met Here 22

1. There was a Consensual Relationship between the Wardens and the Tribe because the Wardens Voluntarily Recognized the Tribe's Sovereign Authority, Processes, and Procedures, and the Tribal Court Exercised Supervisory Authority Over The Wardens' Conduct on the Reservation 23

2. The Wardens' Enforcement of State Law and Allegedly Actionable Behavior on the Reservation Threatens and Affects the Tribe 25

TABLE OF CONTENTS – Continued

Page

III. THE STATE'S SOVEREIGN IMMUNITY FROM SUIT IS NOT AN ISSUE IN THIS CASE BECAUSE THE STATE IS NOT A PARTY TO THE UNDERLYING ACTIONS IN TRIBAL COURT 27

A. The Actions In Tribal Court Are Individual Capacity Suits And Therefore Sovereign Immunity Is Not Implicated..... 27

B. There Is No Reason For A Different Rule As To Individual Capacity Suits Because Tribal Court Jurisdiction Is At Issue 31

1. The Constitution Makes Tribal Sovereignty Subordinate only to the Federal Government, not the States, let alone State Officers in their Individual Capacities 31

2. Notwithstanding The Few Instances of Implicit Divestment This Court Has Found, It Is Not Called For Here Where Federal Law and Policy Support Jurisdiction 34

IV. THE RULINGS BY THE COURT OF APPEALS REGARDING ADJUDICATION OF THE AFFIRMATIVE DEFENSES ARE CONSISTENT WITH THIS COURT'S DECISIONS IN THE AREA OF JUDICIAL CIVIL PROCEDURE AND THE TRIBAL EXHAUSTION RULE 38

A. It Is Firmly Established That Affirmative Defenses Are Non-Jurisdictional 38

B. The Affirmative Defenses Have Not Been Exhausted In This Case Because The Tribal Court Has Not Yet Ruled On The Merits Of Any Such Defenses..... 40

TABLE OF CONTENTS – Continued

Page

V. AS COURTS OF GENERAL JURISDICTION COMPETENT TO APPLY FEDERAL LAW, TRIBAL COURTS HAVE JURISDICTION OVER ACTIONS UNDER 42 U.S.C. § 1983... 44

CONCLUSION 47

TABLE OF AUTHORITIES

Page

CASES

A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986), *cert. denied*, 476 U.S. 1117 (1986) 46

Alden v. Maine, 527 U.S. 706 (1999) 8, 28

Anderson v. Creighton, 483 U.S. 635 (1987) 42

Arizona, ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970) 25

Biscoe v. Arlington County, 738 F.2d 1352 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) 25

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 32, 34

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) 21

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 13, 15, 35

Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985) 28

Dennis v. Higgins, 498 U.S. 439 (1991) 9, 46

Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) 28

Duro v. Reina, 495 U.S. 676 (1990) 36, 37

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 18, 19, 45

FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) 24

Farid v. Smith, 850 F.2d 917 (2nd Cir. 1988) 28

TABLE OF AUTHORITIES – Continued

Page

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 44

Gomez v. Toledo, 446 U.S. 635 (1980) 39

Griess v. Colorado, 841 F.2d 1042 (10th Cir. 1988) 28

Hafer v. Melo, 502 U.S. 21 (1991) ..... *passim*

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 39

Howlett v. Rose, 496 U.S. 356 (1990) 43, 46

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) ..... *passim*

Jackson v. Georgia Department of Transport, 16 F.3d 1573 (11th Cir. 1994), *cert. denied*, 513 U.S. 929 (1994) 28

Jefferson County v. Acker, 527 U.S. 423 (1999) 39

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) 35

Kentucky v. Graham, 473 U.S. 159 (1985) 30

Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc., 523 U.S. 751 (1998) 39

McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) 33

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 7, 15, 18, 44

Mitchell v. Forsyth, 472 U.S. 511 (1985) 41, 42

Monaco v. Mississippi, 292 U.S. 313 (1934) 34

Monell v. New York City Department of Soc. Services, 436 U.S. 658 (1978) 9, 44, 46

Montana v. United States, 450 U.S. 544 (1981) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Morton v. Mancari, 417 U.S. 535 (1974) 12

National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985) 7, 9, 12, 37, 40, 45

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 7, 17

Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe of Okla., 498 U.S. 505 (1991) 30

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 19, 36, 37

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 39

Rice v. Rehner, 463 U.S. 713 (1983) 37

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ... 15, 34

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 8, 33

Siegert v. Gilley, 500 U.S. 226 (1991) 42

Snooks v. Ninth Judicial District Court, 919 P.2d 1064 (Nev. 1996) 46

South Dakota v. Bourland, 508 U.S. 679 (1993) 21

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 5, 8, 18, 19, 21, 22

United States v. Mazurie, 419 U.S. 544 (1975) 15

United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992) 46

United States v. Tsosie, 92 F.3d 1037 (10th Cir. 1996) 46

United States v. Wheeler, 435 U.S. 313 (1978) .. 7, 14, 15, 45

TABLE OF AUTHORITIES – Continued

Page

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).....8, 33

Williams v. Lee, 358 U.S. 217 (1959)..... *passim*

Wilson v. Beebe, 770 F.2d 578 (6th Cir. 1985)..... 28

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).. *passim*

CONSTITUTIONS, STATUTES, AND LEGISLATIVE MATERIALS

Articles of Confederation, art. IX..... 32

U.S. Const. art. I, § 8, cl. 3 .....33, 35

U.S. Const. art. I, § 10..... 32

U.S. Const. art. II, § 2, cl. 2 32

25 U.S.C. § 179..... 45

25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, & 381..... 20

25 U.S.C. §§ 458aa-458gg 13

25 U.S.C. §§ 461-479..... 21

25 U.S.C. §§ 1301-1303..... 37

25 U.S.C. §§ 1301(2)-(4)..... 36

25 U.S.C. § 1302(2) 26

25 U.S.C. § 1302(8) 43

25 U.S.C. §§ 3601-3631..... 8, 37, 44

28 U.S.C. § 1332..... 45

28 U.S.C. § 1441..... 41

42 U.S.C. § 1983..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Act of Apr. 30, 1908, 35 Stat. 70, 85 1

S. Rep. No. 88, 103d Cong., 1st Sess. (1993) 38

Fallon Paiute-Shoshone Constitution 1

Fallon Paiute-Shoshone Law and Order Code, § 1-20-010 46

Fallon Paiute-Shoshone Law and Order Code, § 1-20-020 46

EXECUTIVE MATERIALS

Executive Order No. 13175, 65 Fed. Reg. 67, 249 (Nov. 6, 2000) 13

U.S. Department of the Interior, Bureau of Indian Affairs, Office of Trust Responsibilities, *Annual Report of Indian Lands* (Sept. 30, 1985) 1

TREATISES AND ARTICLES

Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 14, 20

Justice Sandra Day O'Connor, *Lessons From The Third Sovereign*, 33 Tulsa L.J. 1 (1997) 32

STATEMENT OF THE CASE

The lower federal courts in the instant case have upheld the jurisdiction of the Tribal Court of the Fallon Paiute-Shoshone Tribe (Tribe) over underlying actions based on tribal tort law and 42 U.S.C. § 1983.[1] The actions were brought by an enrolled tribal member, Floyd Hicks (Hicks), against non-Indian Game Wardens of the State of Nevada, Department of Wildlife (the Wardens), and the Wildlife Department's Director (Director), all in their individual capacities. It is undisputed that the alleged torts and violations took place entirely on Reservation Indian trust land "controlled by a tribe." Pet. at 24.

Hicks lives on his trust allotment within the Tribe's Reservation. He came under investigation by the Wardens in 1989 for the alleged unlawful possession or killing of a big horn sheep of the California subspecies, a gross misdemeanor under Nevada law. Pet. Br. at 3. Their suspicion of Hicks was based largely on information

---

[1] The Tribe is federally-recognized and exercises its sovereignty, including the operation of its Tribal Court, according to a federally-approved Constitution and Law and Order Code. The Tribe has about 918 members. The Tribe's Reservation, located in western central Nevada, consists of about 8,000 acres. At least since the Reservation was established, this land has been held continually by the United States in trust for the Tribe and for individual tribal members. *See* Act of Apr. 30, 1908, 35 Stat. 70, 85; *see also* U.S. Department of the Interior, Bureau of Indian Affairs, Office of Trust Responsibilities, *Annual Report of Indian Lands* 23 (Sept. 30, 1985). The Reservation has never been disestablished, diminished, or opened by act of Congress.

obtained in January of 1989 from a "Confidential Informant" that the sheep had been "freshly killed" in June of 1988. Pet. App. at E-1 – E-2.

On August 30, 1990, Warden Spencer executed an affidavit and applied for a State search warrant. Pet. App. at E-1 – E-2. The affidavit detailed observations of sheep heads protruding either from Hicks' vehicle, or vehicles located on his premises. *Id.* Based on those observations, Spencer sought a search warrant for Hicks' "premises and property." Pet. App. at E-2. A State Court issued a warrant that day for a search of the "premises." Pet. App. at G-1. The warrant contained the explicit caveat that, "[t]his Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation and, before any search is conducted in furtherance hereof, an approval authorizing same must be obtained from the Fallon Tribal Court in and for the Fallon Paiute-Shoshone Tribes. . . . " *Id.*

The search warrant was presented to the Tribal Judge who affixed the following notation in part: "APPROVED and amended – applies to exterior premises only and to vehicles thereon. . . . " Pet. App. at G-1. Accompanied by a Tribal Police Officer, Spencer entered Hicks' trust allotment. After a search, Spencer seized a forty-year old, mounted sheep head of the Rocky Mountain subspecies from Hicks' vehicle. Pet. Br. at 3. The head was taken off the Reservation and later determined not to be evidence of any crime. It was returned to Hicks, but allegedly in damaged condition. *Id.*

Ten months later, on June 12, 1991, Spencer obtained another State search warrant to search for and seize the same alleged illegal "fresh kill." Pet. App. at F-2 – F-4.

The warrant was based in part on an affidavit averring that sheep heads were seen inside Hicks' residence. *Id.* at F-4. The Tribal Court approved this warrant without modification. *Id.* at F-1. The next day, accompanied by Tribal Police, Wardens Spencer, Ellington, and Fitzmorris entered Hicks' allotment. Pet. Br. at 3. A search of Hicks' residence lead to the seizure of a different forty-year old, mounted sheep head of the Rocky Mountain subspecies. *Id.* at 3. Again, the head was taken off the Reservation and determined not to be evidence of any crime. This head also was returned to Hicks, but allegedly in damaged condition. *Id.*

No charges against Hicks were ever brought by the State of Nevada, and the State has apparently ceased its investigation of him.

In July 1991, Hicks filed a civil action in Tribal Court for money damages for injuries allegedly sustained as a result of the conduct of State and Tribal officials on June 12-13, 1991.[2] Pet. App. H-1 – H-17. Named as defendants were, *inter alia*, the State of Nevada, the Director, and Wardens Spencer, Ellington, and Fitzmorris. *Id.* at H-1. The individual defendants were named in both their official and their individual capacities. *Id.* In June 1992, Hicks filed a second civil action in Tribal Court for money damages for injuries allegedly sustained as a result of the

---

[2] All claims by Hicks against the tribal officials ultimately were either voluntarily dismissed by Hicks or were resolved by the Tribal Court in favor of the tribal officials. *See* Decision and Order Denying All Relief As To Plaintiff's Second Amended Complaint at 4-5, *Hicks v. Harold*, Nos. CV-FT-91-034 and CV-FT-92-031 (Fallon Tribal Ct. May 18, 1992).

conduct on August 30, 1990 of, *inter alia*, Spencer in his official and individual capacity. J.A. at 8-21. Both actions alleged causes of action under tribal common law torts and violations of federal civil rights remediable pursuant to 42 U.S.C. § 1983. Pet. App. at I-4; J.A. at 8-21.

On May 5, 1993, the Tribal Court granted a Motion to Quash in these actions on the ground of ineffective service of process under tribal law. Pet. App. at L-1 – L-2. Hicks appealed to the Western Nevada Inter-Tribal Court of Appeals, of which the Tribe is a member. *See* J.A. at 2 & 3. On May 13, 1994, a three-judge panel of the Inter-Tribal Court of Appeals reversed the Tribal Court on the service of process issue and upheld tribal jurisdiction over the actions. Pet. App. at C-1 – C-8. The cases were remanded to the Tribal Court where they since have been stayed pending final federal court disposition of the question of tribal jurisdiction. *See* Pet. App. at B-4.

The Wardens and the Director, joined by the State of Nevada (collectively referred to as Petitioners) sought declaratory and injunctive relief in federal district court on the issue of tribal jurisdiction. Pet. Br. at 4; *see* J.A. at 4. They did not pursue claims of ineffective service of process in federal court. *See* Pet. App. at A-20 n.3 & B-5 – B-6. In addition to Hicks, Petitioners named as defendants the Tribal Court and the Associate Tribal Judge. Pet. App. at B-1. Hicks and the Tribe filed answers, with the Tribe attaching a limited waiver of sovereign immunity from suit. *See* Pet. App. at A-20 n.2 & B-4; *see also* J.A. at 4.

The case was presented to the federal district court on cross-motions for summary judgment. Pet. App. at

B-4; *see* J.A. at 4-5. Before district court disposition of the case occurred, Hicks successfully moved in Tribal Court to drop the State and all state parties in their official capacities as defendants to his actions there. J.A. 30-35; Pet. App. at A-5 & B-4. The district court then held that the dismissal mooted the issue of tribal court jurisdiction over these parties in those capacities. Pet. App. at B-18 n.3.

On October 1, 1996, Petitioners' summary judgment motion was denied and Hicks' and the Tribe's motions were granted. Pet. App. at B-1 – B-24; *see* J.A. at 5. The district court upheld tribal jurisdiction, finding, *inter alia*, that, even if the conditions for inherent tribal jurisdiction over the activities of non-Indians on land owned in fee by non-Indians which this Court announced in *Montana v. United States*, 450 U.S. 544 (1981) were required, the conditions had been met in this case. Pet. App. at B-12 – B-13. The district court also held that any question of qualified immunity did not present a jurisdictional issue, had not been exhausted in Tribal Court, and would not be reviewed. *Id.* at B-16 – B-17.

Petitioners appealed to the Court of Appeals for the Ninth Circuit. *See* J.A. at 6. On May 20, 1997, the three-judge panel requested supplemental briefing from the parties on the effect of this Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *See* Pet. App. at A-6; J.A. at 6. After oral argument on October 7, 1997, the panel withdrew the case from submission. *See* J.A. at 6-7; Pet. App. at A-1. The case was resubmitted on November 4, 1999. *See* J.A. at 7.

On November 9, 1999, a majority of the panel affirmed that there is tribal jurisdiction over Hicks' claims against the Wardens and the Director in their individual capacities. Pet. App. at A-1 – A-15. The panel majority found tribal authority to regulate the Wardens' conduct on trust land within the Reservation, and a corresponding power to adjudicate issues arising out of the conduct regulated. Pet. App. at A-6 – A-12. The panel majority also agreed with the district court that any non-jurisdictional immunity defenses had not been exhausted in tribal court and the district court was correct not to review them. *Id.* at A-12 – A-15.[3]

Judge Rymer dissented from the panel majority. Pet. App. at A-16 – A-19. She was of the view that *Montana's* conditions for tribal jurisdiction over the activities of non-Indians on non-Indian fee land were required in this case, and that the conditions had not been met. *Id.* at A-17 – A-19. The panel issued an amended opinion on January 24, 2000, largely to clarify that the panel majority did not intend to make any rulings on the merits of the alleged misconduct or liability in the underlying actions. *Id.* at A-1 – A-23; *see* J.A. at 7. Petitioners' petition for rehearing was denied and their suggestion for rehearing *en banc* was rejected on March 9, 2000. Pet. App. at D-1; *see* J.A. at 7.

---

[3] Petitioners grossly mischaracterize the Court of Appeals' opinion as being extremely broad and novel. Pet. Br. at 2. The opinion presents an issue of first impression, but the holding is limited, reasonable, and supportable, as this Brief will demonstrate.

SUMMARY OF ARGUMENT

Indian tribes are inherent sovereigns whose sovereignty pre-dates the Constitution. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542 (1832); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985). They retain all sovereign powers which have not been taken away from them by the Federal Government. *United States v. Wheeler*, 435 U.S. 313 (1978); *Williams v. Lee*, 358 U.S. 217 (1959). This Court's decisions have consistently upheld tribal regulatory and adjudicatory jurisdiction over non-Indian conduct on Indian trust land. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544 (1981); *Williams v. Lee*, 358 U.S. 217 (1959). There is no reason to depart from that rule here.

Tribal jurisdiction exists even assuming *arguendo* that the requirement to meet the conditions for inherent tribal jurisdiction which this Court applied to non-Indian conduct on non-Indian fee land in *Montana v. United States*, 450 U.S. 544 (1981), applies to this Indian trust land case. These conditions are either a consensual relationship between the non-Indian and a Tribe or its members, or, non-Indian conduct which threatens or has some direct effect on the Tribe's political integrity, the economic security, or health and welfare. *Id.* at 565-566. Both conditions are met here. The Wardens sought permission from the Tribe to enter the Reservation in furtherance of a State interest in enforcing state law. The Tribal Court, exercising its supervisory authority, limited the scope of the permitted search. These reciprocal actions constituted the Wardens' consent to tribal regulation of their conduct and to tribal adjudication of any matters arising out of that

regulation. *See Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (correlating tribal legislative with adjudicative jurisdiction). More importantly, however, the alleged deprivations of constitutional and tribal rights *by persons acting under color of state law* on trust land in this case constitute a significant threat to and direct effect on the Tribe. *Cf. Williams v. Lee*, 358 U.S. at 223; 42 U.S.C. § 1983.

State sovereign immunity from suit is not a consideration where, as here, suits are against officers in their individual capacities. *See Alden v. Maine*, 527 U.S. 706, 727 (1999); *Hafer v. Melo*, 502 U.S. 21, 25 (1991). There is no reason to change this rule merely because tribal courts are involved. The structure of the Constitution supports tribal court jurisdiction in this case. The Constitution vests in the Federal Government the exclusive right to manage Indian affairs. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996). Therefore, tribal sovereignty is "dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980). Any divestment or diminishment of tribal sovereignty requires an act of Congress or a showing that the exercise of tribal sovereignty conflicts with "an overriding interest of the National Government." *Id.* at 153. Here, federal legislation and policy overwhelmingly support tribal courts as important forums within the federal system which have inherent jurisdiction over disputes arising within Indian land. *See, e.g.*, the Indian Tribal Justice Act, 25 U.S.C. §§ 3601-3631. The very presence of the United States as *amicus curiae* supporting tribal court jurisdiction is strong evidence of the favorable national policy.

As is the rule with respect to defenses to their jurisdiction, tribal courts should be allowed to determine in the first instance any applicable defenses of qualified or personal immunity. *See National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. at 856-857. The lower federal courts in this case were correct that the merits of any qualified immunity defenses have not been ruled on yet by the Tribal Court. Petitioners were therefore premature in seeking federal court review of qualified immunity defenses when they did.

Federal policy argues in favor of tribal court jurisdiction over actions under 42 U.S.C. § 1983. Section 1983 is a remedial statute which is properly construed broadly to achieve its purpose of protecting federal rights. *Dennis v. Higgins,* 498 U.S. 439, 445 (1991); *Monell v. New York City Dep't of Soc. Servs.,* 436 U.S. 658, 700 (1978). Tribal courts are courts of general jurisdiction, fully capable of deciding issues of federal law. *National Farmers,* 471 U.S. at 855-856. There is no indication that Congress intended to deprive tribal courts of jurisdiction over such actions and the proper inference from silence is that the power exists. *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 18 (1987).

ARGUMENT

I. INTRODUCTION

The parties vary greatly in their views of what this case is about. Petitioners and their *Amici* States initially characterize it as presenting a Constitutional crisis involving State sovereignty. They insinuate that for an

Indian tribe to exercise jurisdiction over a *State is preposterous*. This hyperbole would be inappropriate even if the case did concern an exercise of sovereignty by a tribe over a state, but it does not.

The Tribe's view of this case differs dramatically from that of Petitioners. At issue here is the Tribe's basic right as an inherent sovereign to protect its members' federal and tribal rights within its territory and to provide a remedy when those rights are violated. The necessity for that sovereign authority is accentuated when the alleged offenders are acting "under color of state law." 42 U.S.C. § 1983. Congress has recognized in Section 1983 that individuals so acting pose a greater threat to citizens' rights than do individuals acting without the mantle of state power. Petitioners argue that the status of the Wardens as State employees militates against tribal court jurisdiction, while to the Tribe their status as State employees makes tribal jurisdiction over them in their individual capacities all the more important and justifiable.

The rhetoric of state sovereignty must not obscure an important practical perspective. At a basic level, this case is about whether a basis can be laid for mutual cooperation and respect. The case arose, after all, out of a real-life example of tribal/state cooperation. The Tribe accommodated the State's interest in enforcing state law against one of its own tribal members for an alleged crime occurring off the Tribe's Reservation. The State, for its part, respected tribal sovereignty in seeking tribal approval of its search warrants and having tribal officers accompany state officers to Hicks' residence on the Reservation. Both

sovereigns showed exemplary respect and cooperation, each one for the other.

Hicks alleges that during the investigations his rights were violated by both a Tribal Judge and tribal officers and the State and its officers. All were sued. There was no singling out of State officers. The cases against the State and the State officers in their official capacities have been dismissed and the cases against the Tribal Judge and tribal officers have been resolved. All that remains are the personal capacity suits against the Wardens and the Director. Petitioners chose to challenge tribal court jurisdiction in federal court before the Tribal Court considered any qualified immunity defenses. Because of the federal court action, the Tribal Court has not ruled on any qualified immunity defenses. It is not clear how it would rule if presented with those issues.

Two things are clear, however. First, the extreme rule of immunity from suit in "any capacity" called for by Petitioners is disrespectful of tribal sovereignty, implying second rate status and bias and incompetence of tribal institutions. That attitude has been disallowed by this Court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987). Second, a rule of absolute immunity will destroy the basis for future cooperation between States and Tribes in a wide variety of areas. That is not in anyone's long term interest. This case presents an opportunity to lay the framework for Tribes and States to cooperate if they choose. Once tribal courts demonstrate that they are fair and impartial, trust can develop. The approach suggested by Petitioners will never provide an opportunity for trust to develop. Fortunately, the law supports a basis for cooperation.

II. THE TRIBE HAS INHERENT JURISDICTION OVER THE ACTIONS PENDING IN TRIBAL COURT

Petitioners make two arguments based on principles of federal Indian law that the Tribe's sovereignty does not extend to the underlying actions in Tribal Court in this case. Pet. Br. at 36-44. Initially, they argue that this Court's rule articulated in *Montana v. United States*, 450 U.S. 544 (1981), that certain conditions must be met before inherent tribal jurisdiction will be upheld over the conduct of non-Indians on land owned in fee by non-Indians, should be extended to this case involving non-Indian conduct on Indian trust land. Pet. Br. at 36 & 39-44. Secondly, Petitioners argue that the conditions have not been met and thus there is no tribal jurisdiction here. *Id.* at 36-39. Both arguments must be rejected.

A. Tribes Have Inherent Jurisdiction Over Their Members And Their Territory

Indian tribes are independent sovereigns whose existence predated the coming of the Europeans to this country and hence the formation of the Union. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542 (1832); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985). The European nations dealt with tribes as nations, primarily through treaties "formed as near as may be, on the model of treaties between the crowned heads of Europe." *Worcester*, 31 U.S. (6 Pet.) at 550. The Constitution recognized Tribes as sovereign entities with which the United States could enter into political relations. *Morton v. Mancari*, 417 U.S. 535, 552 (1974) (Indian Commerce Clause

and the treaty power in art. II, § 2, cl. 2, provide the source of the Government's powers to deal with Indian affairs). Under the Constitution, the United States has negotiated hundreds of treaties and other inter-governmental agreements with Tribes. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* 107 (1982 ed.); *see also* 25 U.S.C. §§ 458aa-458gg (Tribal Self Governance Program expressly recognizes "the government-to-government relationship between the United States and Indian tribes," 25 U.S.C. § 458gg(c)); Exec. Order No. 13175, "Consultation and Coordination with Indian Tribal Governments," 65 Fed. Reg. 67, 249 (Nov. 6, 2000).

This Court likewise early-on confirmed the inherent sovereignty of tribes and the post-Constitutional status of that sovereignty. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), a tribe claimed status as a foreign state and sought to invoke the Court's original jurisdiction to enjoin a state from seizing the tribe's land. The Court easily accepted the tribe's status as a state. "So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful." 30 U.S. (5 Pet.) at 16. However, the Court was of the view that tribes were not foreign states so as to sustain the Court's jurisdiction. "They may, more correctly, perhaps, be denominated domestic dependent nations." *Id.* at 17.

In *Worcester*, one of the defenses recognized to the assertion of state jurisdiction over non-Indian missionaries on a tribe's reservation, was the sovereignty of the tribe. As the Court held,

> the settled doctrine of the law of nations, is that a weaker power does not surrender its independence – its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.

31 U.S. (6 Pet.) at 560-561.

The inherent, pre and post-Constitutional nature of tribal sovereignty was perhaps best explained in a case where it was argued that tribal powers had been delegated by the United States. *United States v. Wheeler,* 435 U.S. 313 (1978). In *Wheeler,* the question was whether the double jeopardy clause of the Constitution barred the prosecution of an Indian under federal law. The defendant had previously been convicted in tribal court of a lesser-included offense arising out of the same incident. If tribes did not constitute a third sovereign within the United States, the Constitution would have barred a subsequent prosecution. The Court held that the double jeopardy clause did not bar the subsequent conviction since tribal sovereignty was inherent and did not owe its existence to the federal government.

> The powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.' F. Cohen, *Handbook of Federal Indian Law* 122 (1945) (emphasis in original). . . . Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

435 U.S. at 322-323.

These foundational cases of the Court's federal Indian law jurisprudence – *Cherokee Nation, Worcester,* and its resolution of contemporary definitive issues such as that presented in *Wheeler* – continue to govern this Court's tribal sovereignty decisions. The general rule is that unless federal law provides otherwise, tribes have inherent jurisdiction over both their members and their territory, including the conduct of non-Indians within tribal territory. *United States v. Mazurie,* 419 U.S. 544, 557-558 (1975); *see also Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 139-140 (1982) (power to tax non-Indians is "one of the tools necessary to [tribal] self-government and territorial control"); *Iowa Mutual,* 480 U.S. at 14 ("tribes retain 'attributes of sovereignty over both their members and their territory,' to the extent that sovereignty has not been withdrawn by federal statute or treaty").

Tribal jurisdiction over non-Indians includes adjudicatory authority.[4] As the United States points out, "[c]entral to tribal sovereignty is proper respect for tribal courts. . . . " Br. of U.S. as Amicus Curiae at 1. In *Williams*

---

[4] "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. . . . " *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65-66 (1978).

Despite this recognition, Petitioners complain that litigation in tribal court is "difficult," due to their unfamiliarity with tribal law and procedures. Pet. Br. at 23. Petitioners ignore that Anglo-American courts have been allowed to develop over great periods of time. Tribal Courts have made great strides and will continue to do so with the support of Congress, this Court, and the Executive Branch of the Federal Government. *See* Br. of U.S. at 1-3.

v. Lee, 358 U.S. 217 (1959), the Court found exclusive tribal court jurisdiction over an action brought by a non-Indian to collect on a debt incurred by Indians on a reservation. The Court stated:

> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . If this power is to be taken away from them, it is for Congress to do it.

358 U.S. at 223 (citations omitted). These basic federal law principles of tribal sovereignty govern the jurisdictional question in this case.

B. The Presumption of Inherent Tribal Jurisdiction Governs This Case Arising On Indian Trust Land

Since at least *Montana v. United States*, 450 U.S. 544 (1981), this Court has established two different tests for determining tribal jurisdiction over the conduct of non-Indians within tribal territory. On Indian trust lands – lands which are held by the federal government in trust for a tribe or for individual Indians – there is a presumption of tribal jurisdiction. On lands located within the exterior boundaries of tribal territory but which have passed out of trust and are held in fee simple by non-Indians, tribal inherent jurisdiction is not divested if certain conditions are met.

Montana involved, *inter alia*, an issue of tribal authority to regulate hunting and fishing by non-Indians within

a reservation. 450 U.S. at 548. The Court expressly differentiated between two types of land within the reservation: 1) land owned by the tribe or tribal members; and, 2) land owned in fee by non-Indians. *Id.* at 557. Consequently, the Court dealt separately with the issues of tribal powers over non-Indian conduct on each type of land. *Id.* at 557-566.

The Court agreed with the holding below regarding tribal jurisdiction on trust land.

> The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits.

450 U.S. at 557 (citation omitted).

Two terms later, in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), the follow-up question to *Montana* arose: is tribal jurisdiction to regulate non-Indian hunting and fishing on Indian trust land exclusive of state jurisdiction. In holding that tribal jurisdiction was exclusive, this Court expressly affirmed the significance of the status of the land as Indian land.

> Our decision in *Montana v. United States, supra,* does not resolve this question [of whether the state may regulate hunting and fishing of non-Indians on Indian land where the Tribe is doing so]. Unlike this case, *Montana* concerned lands located within the reservation but *not* owned by

> the Tribe or its members. We held that the Crow Tribe could not as a general matter regulate hunting and fishing on those lands. But as to 'land belonging to the Tribe or held by the United States in trust for the Tribe,' we 'readily agree[d]' that a Tribe may 'prohibit nonmembers from hunting or fishing . . . [or] condition their entry by charging a fee or establishing bag and creel limits.'

462 U.S. at 330-331 (alterations in original; citations and footnote omitted); *see also Merrion*, 455 U.S. at 139-140 (one term after *Montana*, upholding tribal taxation of non-Indian activities conducted on Indian land without reference to the *Montana* conditions).

Very recently, in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this Court again affirmed the importance of land status to questions of tribal jurisdiction. The Court found that the land in *Strate* – an easement for a state highway to cross over Indian trust land within a reservation that had been granted under a federal right-of-way statute – was the equivalent of non-Indian fee land. 520 U.S. at 454. The Court nevertheless expressly stated that, "[W]e 'can readily agree,' in accord with *Montana*, 450 U.S., at 557, that tribes retain considerable control over nonmember conduct on tribal land." 520 U.S. at 453.

The Court's most recent affirmance on this point is *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999). There, the Court held that Congress had made a clear preference for the adjudication of nuclear torts in federal court such that the normal rule providing for tribal exhaustion of questions of tribal court jurisdiction did not apply. 526 U.S. at 484-485. In the course of its opinion, the

Court responded to an argument that, in any event, tribal courts lack jurisdiction over such claims. The argument was based on a holding of *Strate v. A-1 Contractors*, that tribal courts have jurisdiction over non-Indian conduct only where tribes have regulatory jurisdiction over the matter at issue. Since, the argument in *Neztsosie* went, Congress had preempted the regulation of nuclear activity, tribal courts were without jurisdiction over the tort claims. The Court rejected that argument as follows:

> But *Strate* dealt with claims against nonmembers arising on state highways, and 'express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation.' . . . By contrast, the events in question here occurred on tribal lands.

526 U.S. at 482 n.4.

These Indian trust land decisions must be compared with the non-Indian fee land portion of *Montana* where the Court required a showing of certain conditions for a tribe's inherent sovereignty to exist.

> But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. . . . The Court recently applied these general principles in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians. . . . Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the

> inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.

450 U.S. at 564-65.

The reason for the distinction drawn by the Court between fee and trust land is clear in light of allotment acts – the federal statutes enacted primarily in the late 1880s and early 1900s. *See, e.g.*, the General Allotment Act, 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, & 381. By these acts, Congress divided communal tribal land into individual parcels of land (allotments) for individual tribal members, and opened up other Indian land to private ownership by non-Indians. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* at 127-138. In *Montana* this Court concluded from its review of the legislative history of allotment that:

> There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. . . . It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

450 U.S. at 559 n.9.

Montana's holding regarding tribal jurisdiction over non-Indian conduct on non-Indian fee land thus relied

heavily on Congress' opening of Indian land to non-Indians and the settled expectations of non-Indians about living on land that they owned. The Court acknowledged that allotment and sale of surplus Indian lands were repudiated in 1934 by the Indian Reorganization Act, 25 U.S.C. §§ 461-479. The Court concluded however, that "what is relevant in this case is the effect of the land alienation occasioned by that [allotment] policy on Indian treaty rights tied to Indian use and occupation of reservation land." 450 U.S. at 559 n.9.

Subsequently, the Court has applied this reasoning to other cases involving congressional alienation of Indian land. *E.g., Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989) (allotted land that had passed out of trust and into fee owned by non-Indians); *South Dakota v. Bourland,* 508 U.S. 679 (1993) (land taken and opened up for recreational use in connection with federal flood control and dam legislation); *Strate,* 520 U.S. at 454-456 (easement for highway granted pursuant to federal right of way statute).

The Court, however, has never done what Petitioners now ask it to do: require the conditions for tribal jurisdiction over non-Indian conduct on alienated land in a case arising on Indian trust land. *See* Pet. Br. at 39-43.[5] As

---

[5] Petitioners' *Amici* States accurately read *Montana* as requiring the conditions for inherent tribal sovereignty to be met only when the non-Indian conduct occurs on non-Indian fee lands. *Amici* States' Br. at 12. The United States also agrees that, based on land status, this Court has already drawn the "very jurisdictional distinction that petitioners seek to avoid." Br. of U.S. at 10.

recently as *Strate*, this Court confirmed that *Montana* establishes "a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non Indian land within a reservation, subject to two exceptions. . . . " 520 U.S. at 446. In contrast, this Court in *Strate* noted that *Montana* also establishes "that tribes retain considerable control over nonmember conduct on tribal land." *Id.* at 454.

There is no sound reason for accepting Petitioners' argument. The requisite basis for the *Montana* conditions – Congress' intent, land alienation, and the parties' expectations – are simply not present with respect to Indian trust land. Instead, Tribes reasonably expect to control non-Indian conduct on trust land. Non-Indians have no reasonable expectation of being free from tribal jurisdiction on that land. The Wardens had no such expectation, as they were properly advised by their own judiciary that the State has no jurisdiction on the Tribe's Reservation. Pet. App. at G-1.

C. Alternatively, Assuming *Arguendo* That The *Montana* Conditions For Tribal Jurisdiction Over Non-Indian Conduct On Non-Indian Fee Land Must Be Met In This Indian Trust Land Case, The Conditions Are Met Here

Assuming *arguendo* that the *Montana* conditions for tribal jurisdiction over non-Indian conduct on alienated land apply to this case arising on Indian trust land, there nevertheless is tribal jurisdiction here. *Montana* instructs that:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-566.

Thus, tribes have inherent jurisdiction over non-Indian conduct where either: 1) there is a "consensual relationship" between the non-Indian and a tribe or a member of the tribe; or, 2) a non-Indian's conduct threatens or directly affects a tribe's political integrity, economic security, or health and welfare. In this case, both conditions are met.

1. There was a Consensual Relationship between the Wardens and the Tribe because the Wardens Voluntarily Recognized the Tribe's Sovereign Authority, Processes, and Procedures, and the Tribal Court Exercised Supervisory Authority Over The Wardens' Conduct on the Reservation

Montana exemplifies consensual relationships as including "commercial dealing, contracts, leases, or other

arrangements." 450 U.S. at 565. Inherent in these examples and, indeed in the term "consensual" itself, is a voluntary act undertaken by one party with the mutual assent of the other party. *See, e.g., FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-1315 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) (upholding tribal regulation of employment practices of non-Indian mining company operating on non-Indian fee land within a reservation). Clearly there is voluntariness and mutuality in the present case. The State's own court admitted in the first search warrant that the State has no independent jurisdiction on the Reservation. Pet. App. at G-1. The Wardens concede that each time they entered the Reservation, they "obtained approval from Tribal Judge Rebecca Harold to execute the warrants on the reservation." Pet. Br. at 3. "Tribal police officers accompanied the wardens when they conducted the search." *Id.* The Tribal Court expressly limited the scope of the first warrant to the "exterior premises only and to vehicles thereon. . . . ," because the affidavit in support of the warrant indicated sightings of the sheep heads only in vehicles. Pet. App. at F-1 & E-1 – E-2.

The Wardens thus recognized and consented to the authority, processes, and procedures of the Tribe as a sovereign. In return, the Tribal Court, subject to its supervision, allowed the Wardens to enter the Tribe's territory for limited purposes. These voluntary and mutual undertakings between sovereigns are within the scope of the consensual relationships identified in *Montana*. Petitioners' suggestion that a consensual relationship must be

commercial is based on an overly strict reading of *Montana* and is unsound. Pet. Br. at 36-37. There is no principled reason for excluding sovereign-to-sovereign agreements from the consensual relationship condition.

2. The Wardens' Enforcement of State Law and Allegedly Actionable Behavior on the Reservation Threatens and Affects the Tribe

The Wardens here indisputably were attempting to enforce the State's criminal laws against a tribal member on the Reservation. Where a law enforcement officer acts within the territory of another sovereign, such action "directly implicates the sovereignty" of the other sovereign. *Biscoe v. Arlington County*, 738 F.2d 1352, 1358 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985). The same is true in the state-tribal setting. In *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970), a state tried to arrest an Indian on a reservation and extradite him pursuant to state law to another state where he was wanted. The Court of Appeals held that in light of the relationship between tribes and the United States,

> and the long history of the principle of retained tribal sovereignty. . . . Arizona's exercise of the claimed jurisdiction would clearly interfere with rights essential to the Navajo's self-government . . . . This conclusion does not frustrate the State of Arizona in carrying out [state law]. It simply recognizes that Arizona has no authority, and hence no duty, to exercise extradition jurisdiction over Indian residents of the Navajo Reservation.

413 F.2d at 685-686.

The federal district court in this case noted the Tribe's interest in the Wardens' activities.

> [T]ribal law provided very specific restrictions on the execution of extraterritorial search warrants on the reservation. These tribal law provisions. . . . clearly show that the tribe viewed the execution of state search warrants on the reservation as bearing directly on the political integrity of the tribe. By enacting such provisions, the tribe has asserted its interest in adjudicating such disputes.

Pet. App. at B-13 (citations omitted). Furthermore, the Tribal Court's limitation of the first warrant and supervision of both warrants follow the dictates of the Indian Civil Rights Act to respect "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures. . . . " 25 U.S.C. § 1302(2).[6]

Finally, Congress recognizes that persons acting under color of state law pose a more serious threat to a person's rights than do persons acting privately. 42 U.S.C. § 1983. That legislative insight is valid whether an action is brought under Section 1983 or tribal law. The status of the Wardens as employees of the State strengthens immeasurably the argument that their actions threaten and affect the political integrity of the Tribe. If tribes lack jurisdiction to hear their members' allegations that their

---

[6] Contrary to Petitioners' argument, Pet. Br. at 38-39 & 44, the Tribal Court did not cede the Tribe's "gatekeeping right" when it modified the warrant and maintained supervisory control over the Wardens' execution of the warrant. To supervise is the opposite of ceding.

federal and tribal rights have been violated by persons acting under color of state law, this would seriously "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Williams v. Lee*, 358 U.S. at 223.

III. THE STATE'S SOVEREIGN IMMUNITY FROM SUIT IS NOT AN ISSUE IN THIS CASE BECAUSE THE STATE IS NOT A PARTY TO THE UNDERLYING ACTIONS IN TRIBAL COURT

A. The Actions In Tribal Court Are Individual Capacity Suits And Therefore Sovereign Immunity Is Not Implicated

At Hicks' instigation, the State and its officials in their official capacity were dismissed from the underlying actions in Tribal Court long ago. J.A. at 30-35. The remaining causes of action pending are against state officials in their individual capacities. In complete disregard of these facts, Petitioners and *Amici* States argue this case as though the State and its officials in their official capacity were still defendants before the Tribal Court. *E.g.*, Pet. Br. at 10-13 (complaining that the Tribe is seeking to "abrogate the State's sovereign immunity from suit"); *Amici* States' Br. at 24 (arguing that the Constitution left intact state sovereign immunity from suit, including suit in tribal court). This problem infects much of their Briefs and renders them largely beside the point. Unable to accept the nature of the underlying actions, Petitioners nevertheless argue that state sovereign immunity from

suit applies with full force to bar them. This position is untenable under pertinent law.[7]

The presence of public officials in individual capacity suits does not implicate sovereign immunity. As this Court explained in *Hafer v. Melo*, 502 U.S. 21 (1991),

> The Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983. . . .

502 U.S. at 31. This was also acknowledged in *Alden v. Maine*, 527 U.S. 706 (1999), a case generally supportive of state sovereign immunity, in which this Court nevertheless noted that:

> Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is not sought from the state treasury but from the officer personally.

527 U.S. at 757.

---

[7] Petitioners and their *Amici* point out that under Nevada law, the State will indemnify the individual officers. Pet. Br. at 9; *Amici* States' Br. at 28 n.4. That is a voluntary act on the State's part and does not extend its sovereign immunity to suits brought against its officers in their individual capacity. *Demery v. Kupperman*, 735 F.2d 1139, 1145 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985); *Wilson v. Beebe*, 770 F.2d 578, 588 (6th Cir. 1985); *Griess v. Colorado*, 841 F.2d 1042, 1045-46 (10th Cir. 1988); *Jackson v. Georgia Dep't of Transp.*, 16 F.3d 1573, 1577-78 (11th Cir. 1994), *cert. denied*, 513 U.S. 929 (1994); *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986); *Farid v. Smith*, 850 F.2d 917, 923 (2nd Cir. 1988).

These cases, particularly *Hafer v. Melo*, resolve virtually all of Petitioners' arguments in this area. In *Hafer*, suit was brought under 42 U.S.C. § 1983 against a state auditor general for alleged improper dismissal of state employees. Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State. . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

42 U.S.C. § 1983. The defendant in *Hafer* was sued in her individual capacity. She argued, similarly to Petitioners here, Pet. Br. at 20-22, that she fired the employees while acting in her official capacity and that Section 1983 liability turns not on the capacity in which state officials are sued, but on the capacity in which they acted when allegedly injuring a plaintiff. This Court rejected that argument.

> Through § 1983, Congress sought 'to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position.' Accordingly, it authorized suits to redress deprivations of civil rights by persons acting 'under color of any [state] statute, ordinance, regulation, custom, or usage.' 42 U.S.C. § 1983. The requirement of action under color of state law means that Hafer may be liable for discharging respondents precisely because of her authority as auditor general. We cannot

> accept the novel proposition that this same official authority insulates Hafer from suit.

502 U.S. at 27-28 (citations omitted).

The defendant in *Hafer* also argued, as do Petitioners here, Pet. Br. at 7 & 20, that individual capacity suits are pleading technicalities to avoid state sovereign immunity.[8] Again, this Court disagreed.

> [T]he distinction between official-capacity suits and personal-capacity suits is more than 'a mere pleading device.' State officers sued for damages in their official capacity are not 'persons' for purposes of the suit because they assume the identity of the government that employs them. By contrast, officers sued in their personal capacity **come to court as individuals.**

502 U.S. at 27 (citations omitted; emphasis added).[9]

Under *Hafer*, it is precisely because the Wardens here were acting as state officials when the alleged deprivation of federal rights occurred that, if proven, makes them liable under Section 1983. Petitioners' argument that state sovereign immunity *per se* protects the Wardens flies in

---

[8] The rule allowing individual capacity suits is not an exception to the doctrine of sovereign immunity as Petitioners assert. Pet Br. at 20. *See* Br. of U.S. at 15; *Kentucky v. Graham*, 473 U.S. 159 (1985). Furthermore, the rule does vindicate federal rights while facilitating tribal control over their reservations.

[9] Petitioners argue that individual capacity suits against state officers are unfair because of lack of mutuality. Absent from Petitioners' Brief is any citation to this Court's references to individual capacity suits against tribal officials. *E.g.*, *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 514 (1991).

the face of *Hafer* and Congress' judgment as reflected in Section 1983.[10]

Officers in individual capacity suits may assert personal immunity defenses. *Hafer*, 502 U.S. at 31. In recognition of this holding, Hicks, the Tribal Respondents, the United States, and the lower federal courts are all of one mind that the Wardens are entitled to assert personal immunity defenses in the underlying actions here. *See, e.g.*, Br. of U.S. at 17 ("state officers sued in tribal court [in their individual capacities], whether under federal or tribal law, may assert . . . immunity defenses."). Petitioners have advanced no argument that justifies more than that simply because Indian interests are involved.

B. There Is No Reason For A Different Rule As To Individual Capacity Suits Because Tribal Court Jurisdiction Is At Issue

1. The Constitution Makes Tribal Sovereignty Subordinate only to the Federal Government, not the States, let alone State Officers in their Individual Capacities

Petitioners also argue that tribal jurisdiction may not lie in this case because the very structure of the Constitution and the dependent status of tribes under federal law prohibit tribal courts from exercising jurisdiction over state officers "in any capacity." Pet. Br. at 10; *see also,*

---

[10] Petitioners argue, Pet. Br. at 29, that tribal jurisdiction over state officials in their individual capacities leads to similiar jurisdiction over federal officials. The latter issue is not presented in this case. *But see* Br. of U.S. at 29 n.22.

Amici States' Br. at 6-7 & 10. Despite Petitioners' arguments to the contrary, *see, e.g.*, Pet. Br. at 15, traditional analysis has always relied heavily on the Constitution's recognition of three sovereigns and, as between the states and the federal government, the complete delegation of power over Indian affairs to the Federal Government.[11]

After the colonies achieved independence, "Congress assumed the management of Indian affairs; first in the name of these United Colonies, and afterward in the name of the United States." *Worcester*, 31 U.S. (6 Pet.) at 558. Article IX of the Articles of Confederation gave the "United States in Congress assembled the sole and exclusive right of 'regulating the trade and managing all the affairs with the Indians, not members of any of the States: provided that the legislative power of any State within its own limits be not infringed or violated.' " *Id.* at 558-559. This inherently contradictory language was construed by some states to annul the power itself. *Id.* at 559. The problems created by the language of the Articles were resolved in the Constitution. The States ceded to the Federal Government the exclusive power to make treaties. *See* U.S. Const. art. I, § 10, and art. II, § 2, cl. 2,

---

[11] It is unclear what Petitioners mean by their statement that the Constitution's "bilateral structure permits no third berth for tribes." Pet. Br. at 15. If the statement means that tribes are not within the plan of convention, that is a commonplace. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). If it means that there are not three types of sovereign entities within the geographical borders of the United States, it is wrong as previous sections of this Brief have established. *See also* Justice Sandra Day O'Connor, *Lessons From The Third Sovereign*, 33 Tulsa L.J. 1 (1997) ("There are three sovereigns in our country – the states, Federal Government, and the Tribes.")

and the power to "regulate Commerce . . . with the Indian Tribes," *Id.* at art. I, § 8, cl. 3. *See also Worcester* 31 U.S. (6 Pet.) at 561; *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) (stating that federal authority over Indian affairs derives from commerce and treaty provisions).

The net result is that under the Constitution, exclusive power to govern Indian affairs resides in the Congress. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996). Petitioners concede that the Indian Commerce Clause establishes that Indian relations are the exclusive province of federal law, and that "[t]he Commerce Clause . . . establishes federal authority over commerce with the Indians." Pet. Br. at 11 & 14; *see also Amici* States' Br. at 7 & 21. As this Court has made clear, this Constitutional structure makes tribal sovereignty subordinate only to the federal government, not to the states. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980) (irrelevant that a tribe's taxing scheme might implicate state sovereignty, since tribal sovereignty is subordinate only to the Federal Government).

Nothing about this structure prohibits tribal courts from exercising jurisdiction in cases such as the underlying actions. As the United States points out,

> Petitioners cannot point to any Treaty or Act of Congress divesting Tribes generally, or the Fallon Paiute-Shoshone Tribe specifically, of all power to adjudicate claims against state officers in their personal capacities . . . [Petitioners' argument is] based on principles of sovereign

> and qualified immunity. Petitioners are mistaken.

Br. of U.S. at 15.

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991), relied on by Petitioners for their "not in any capacity" argument, has no relevance to this case. *See* Pet. Br. at 11-13. *Blatchford* presented the narrow question of whether a tribe was barred by the Eleventh Amendment from suing a state in federal court. In answering that question in the affirmative, the Court relied primarily on its holding in *Monaco v. Mississippi*, 292 U.S. 313 (1934), that the Eleventh Amendment barred a foreign sovereign from suing a State. Since tribes, like foreign states, were strangers to the constitutional convention, the Court in *Blatchford* held that they could not sue States in federal court either. 501 U.S. at 781. But *Blatchford* did not involve suits against officials in their individual capacities, and its holding comfortably coexists with the principle that such suits are allowed, even in tribal court, because they do not implicate sovereign immunity.

2. Notwithstanding The Few Instances of Implicit Divestment This Court Has Found, It Is Not Called For Here Where Federal Law and Policy Support Jurisdiction

Williams v. Lee indicated that if Tribes are to lose an aspect of their inherent sovereignty, it is generally for Congress to take it away because of some overriding federal interest. 358 U.S. at 223; *see also Santa Clara Pueblo v. Martinez*, 436 U.S. at 60 ("a proper respect both for tribal sovereignty itself and for the plenary authority of

Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."). It is, after all, Congress which is given the exclusive authority to regulate commerce with the Indian tribes. U.S. Const., art. I, § 8, cl. 3.

Nevertheless, on rare occasions this Court has found a power of tribes to be "generally and implicitly" divested as a result of their dependent status. The Court has acted cautiously in this area, noting the general rule that "Tribal powers are not implicitly divested by virtue of the tribes' dependent status." *Colville*, 447 U.S. at 153. The Court has found an implicit divestiture only "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government. . . . " *Id.* Those instances have been remarkably few. Even in those instances, there have been important expressions of federal policy. The Court did not write on a clean slate.

In the early days of this nation, this Court held in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), that Indians could not alienate their lands to non-Indians without federal consent. This rule had been established by the European powers before formation of the Union and was held to have been absorbed into the law of the United States. A few years later, in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 15-17, the Court held that an Indian tribe could not engage in foreign relations. This result stemmed from the treaty involved in which the tribe, as with tribes generally, had placed itself under the authority of the United States. Both of these activities by

a tribe would have seriously conflicted with clearly delineated, overriding federal interests. After these two decisions, the doctrine of implicit divestment lay dormant for nearly one hundred and fifty years.

The Court resurrected the doctrine of implicit divestment in the criminal law area. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), involved a tribe's assertion of criminal jurisdiction over a non-Indian. While no federal statute spoke directly to this issue, a record of legislation contained strong indications of congressional and Executive views on the subject. This history of federal legislation concerning federal jurisdiction over non-Indian criminal activity within reservations, lead this Court to conclude that, "while Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions." 435 U.S. at 204. This implicit congressional intent coupled with a concern for the personal liberty and rights of United States citizens, caused the Court to hold that tribes had been implicitly divested of criminal jurisdiction over non-Indians. *Id.* at 210.[12]

As has been discussed, tribal civil jurisdiction over non-Indians has been implicitly divested to a far lesser

---

[12] This holding was extended in *Duro v. Reina*, 495 U.S. 676 (1990), to prohibit tribes from trying and punishing Indians who are members of another tribe. *Duro* has since been overturned by Congress to clarify that tribes may exercise some criminal jurisdiction over members of other tribes. 25 U.S.C. §§ 1301(2)-(4).

extent. *Montana*, 450 U.S. at 565-566; *National Farmers*, 471 U.S. at 854 (expressly declining to extend *Oliphant* to the civil area).[13] But as discussed, even under *Montana* there is tribal jurisdiction in the present case, especially since the Wardens were acting under color of state law.[14]

Furthermore, the existence and exercise of tribal jurisdiction here furthers important federal interests. Regarding the Section 1983 claims, tribal court jurisdiction helps enforce a federal remedial statute. Regarding the tribal law claims, tribal court jurisdiction is in harmony with Congress' support for the development and acknowledgment of the inherent authority of tribal courts. *See, e.g.*, The Indian Tribal Justice Act, 25 U.S.C. §§ 3601(4)-3601(6) (tribes possess "inherent authority to

---

[13] In addition, the Court has referred to implicit divestment in the special area of regulation of liquor sales in Indian country, an area in which Congress has had a comprehensive role since the beginning of this Nation. *Rice v. Rehner*, 463 U.S. 713, 724-26 (1983).

[14] That the Court's treatment of tribal civil jurisdiction differs vastly from its treatment of tribal criminal jurisdiction is well-acknowledged. *See Iowa Mutual*, 480 U.S. at 15 ("Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, their civil jurisdiction is not similarly restricted"); *Duro*, 495 U.S. at 687-688 ("The development of principles governing civil jurisdiction in Indian country has been markedly different from the development of rules dealing with criminal jurisdiction").

Congress has likewise placed greater restrictions on tribal authority in criminal cases than in civil cases. The Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, limits the criminal penalties that tribes can impose for violations of that Act, but it does not similarly regulate the civil remedies which tribes may make available for violations of the Act.

establish their own form of government, including tribal justice systems . . . " [and tribal courts are] "important forums for ensuring public health and safety and the political integrity of tribal governments" [and the] "appropriate for ms for the adjudication of disputes affecting personal and property rights"). The Senate Report accompanying the Act acknowledged that "tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals." S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993). *See also* Br. of the U.S. at 2-3 (discussing congressional support for tribal courts).

Finally, the presence of the United States before this Court in this case, urging affirmance of the decision below, indicates clearly that allowing individual capacity suits against state officers in tribal court is in harmony with federal policy.

In short, this case is not one calling for implicit divestment of tribal jurisdiction. To the contrary, federal law and policy converge to support, indeed to require, tribal court jurisdiction so as not to undermine the tribal right of self-government. *Williams v. Lee*, 358 U.S. at 223.

IV. THE RULINGS BY THE COURT OF APPEALS REGARDING ADJUDICATION OF THE AFFIRMATIVE DEFENSES ARE CONSISTENT WITH THIS COURT'S DECISIONS IN THE AREA OF JUDICIAL CIVIL PROCEDURE AND THE TRIBAL EXHAUSTION RULE

A. It Is Firmly Established That Affirmative Defenses Are Non-Jurisdictional

In Part II of their Brief (pp. 29-35) Petitioners again ignore that the actions in Tribal Court are against the

Wardens in their individual capacities. Instead, Petitioners rely exclusively on cases establishing that, when states are sued or state officers are sued in their official capacity, or, when tribes are sued or tribal officers are sued in their official capacity, the sovereign immunity defense is treated basically as jurisdictional.[15] These cases are not applicable here. Assertions of qualified immunity are not jurisdictional, they are personal affirmative defenses. *Hafer v. Melo*, 503 U.S. at 28; *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) ("Qualified immunity . . . is an affirmative defense that must be pleaded by a defendant official."); *see also Jefferson County v. Acker*, 527 U.S. 423, 447 (1999) (Scalia, J., dissenting) (suggesting that it would be "an odd result" to subsume the merits of the defense of qualified immunity within the "threshold jurisdictional question"); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (while qualified immunity is an available defense, it is not relevant to the existence of a cause of action).

---

[15] Petitioners cite a plethora of cases, which all stand for the same proposition. Regarding state immunity, *see, e.g., Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). Regarding tribal immunity, *see, e.g., Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998). There is perfect symmetry in the treatment of state and tribal immunity as jurisdictional defenses, when the sovereigns are sued or when the officers of either sovereign are sued in their official capacities.

B. The Affirmative Defenses Have Not Been Exhausted In This Case Because The Tribal Court Has Not Yet Ruled On The Merits Of Any Such Defenses

The lower federal courts correctly ruled that the Wardens' personal immunity defenses, if any, are subject to this Court's exhaustion of tribal remedies rule. *See also* Br. of U.S. at 17 ("We agree with the courts below that the prudential tribal court exhaustion rule of *National Farmers* and *Iowa Mutual* ordinarily should apply to those federal immunity defenses as they do to federal jurisdictional defenses.").[16] Petitioners complain that they submitted a sovereign immunity defense and qualified immunity defenses to the Tribal Court at the same time, and that the Tribal Court rejected both defenses. *See* Pet. Br. at 4-5 & 31-33. Both lower federal courts, however, held that the qualified immunity defenses were not decided on the merits. They understood that Petitioners invoked the doctrines of "sovereign immunity" and "qualified immunity" only in support of their contention that the Tribal Court lacked personal jurisdiction over them. Pet. App. at A-13. The lower federal courts thus quite correctly concluded that the Tribal Court merely held that no immunity defenses precluded tribal court jurisdiction in the first instance. Pet. App. A-12 – A-13.

---

[16] Petitioners desire that there be no "role for tribal courts" in the federal system into which, in Petitioners' view, "tribes do not fit." Pet. Br. at 15 & 16. Of course, this Court's cases such as *Williams v. Lee; National Farmers*; and, *Iowa Mutual* have already placed tribal courts within the federal system. What is most important, then, is to ensure that they are well-placed.

Had Petitioners not immediately sought federal court review of the jurisdictional issue, however, the Tribal Court likely would have proceeded to address any applicable qualified immunity defenses. This procedure is required by the principle that the doctrine of qualified immunity constitutes an immunity from suit, not merely a defense to liability, and that the doctrine is undermined if an action is allowed to go to trial or even to have extensive pretrial proceedings. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The Tribal Court actions have not run afoul of these rules as there have to date been no discovery proceedings or trial proceedings. *See also* Br. of U.S. at 22-23 (personal immunity defenses are subject to exhaustion in tribal court as long as they can "be fully adjudicated in advance of trial. . . . [and] such pretrial matters as discovery. . . . ").[17]

---

[17] The United States suggests that, given the presence of federal claims in the underlying actions, the Wardens should have an absolute right of removal to federal court, analogous to that in 28 U.S.C. § 1441. Br. of U.S. at 24-30. This suggestion of a wholesale and implied application of Section 1441 to cases in tribal courts should be rejected as overbroad, unnecessary, and contrary to the congressional policy of the development of tribal courts. For example, Section 1441 is available to any "defendant" and thus would allow removal by private non-Indian parties and even by tribal members. The term "federal question" is broad and covers much of what tribal courts handle in terms of federal Indian law statutes, principles of federal Indian law, and tribal treaties. Congress, not this Court, should determine whether tribal courts may not hear these cases.

Moreover, for the United States to characterize its suggestion as putting tribal and state courts on a par is disingenuous. Br. of U.S. at 28. Tribal courts are already at a severe disadvantage in relation to state courts. To deprive them

The lower federal courts properly understood that in this case, assuming that jurisdiction is upheld, the earliest possible adjudication of the merits of the affirmative defenses will occur after final disposition of the jurisdictional issue. While the Tribal Appellate Court instructed the tribal court to "set a trial date," Pet. Br. at 5; Pet. App. at C-5, the Court of Appeals, Pet. App. at A-12 – A-15, undoubtedly meant for the Tribal Court to follow this Court's cases and engage in the affirmative defense adjudication before trial or extensive discovery, to ensure that the Wardens are not subjected to "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

While rulings on qualified immunity should take place at the earliest possible time, it is also true that qualified immunity defenses often have a factual element. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Mitchell v. Forsyth*, 472 U.S. at 526. It is that factual context which was never developed in the Tribal Court. As the federal district court noted:

> Although plaintiffs argue that the tribal court 'implicitly' ruled on the defense, the court disagrees. The tribal court did not hold an evidentiary hearing or make definitive findings of fact or conclusions of law on the application of the

---

of even more jurisdiction *in the absence of clear congressional intent* threatens to seriously undermine their efficacy. The present system of exhaustion of tribal remedies gives due respect to tribal sovereignty and provides ample opportunity for federal court review. It strikes a healthy balance among the competing interests at stake and should be adhered to by this Court.

> qualified immunity defense to the facts of this case. The court held only that qualified immunity was not a jurisdictional bar to tribal court jurisdiction in the first instance.

Pet. App. at B-16.

If this Court sustains tribal jurisdiction, the first order of business on remand would be to consider the merits of any asserted qualified immunity defenses. Such a procedure is in harmony with what is called for by the Court's decisions.[18]

---

[18] The United States posits that, while all personal immunity defenses are subject to exhaustion in tribal court, substantive federal law should govern the scope of any qualified immunity defense, whether asserted in response to a claim under federal law or tribal law. Br. of U.S. at 18-21. This issue is not before the Court in this case. It is clear, however, that federal law will govern all aspects of the Section 1983 claims. *Howlett v. Rose*, 496 U.S. 356, 375 (1990) ("The elements of, and the defenses to, a federal cause of action are defined by federal law.").

Regarding the tribal law claims, the United States' suggestion that reciprocal federal law defenses for state and tribal officials sued in their individual capacities in each others' courts, provides a justifiable basis for future cooperation and certainty. Br. of U.S. at 18.

V. AS COURTS OF GENERAL JURISDICTION COMPETENT TO APPLY FEDERAL LAW, TRIBAL COURTS HAVE JURISDICTION OVER ACTIONS UNDER 42 U.S.C. § 1983

Petitioners argue incorrectly that tribal courts lack jurisdiction over actions brought pursuant to 42 U.S.C. § 1983. Petitioners initially argue that any waiver of state sovereign immunity must be clearly expressed and that Congress lacks authority to effectuate such a waiver of the states' immunity. Pet. Br. at 24.[19] But no one is claiming a waiver of sovereign immunity under Section 1983.[20] *See Hafer v. Melo*, 502 U.S. at 30 ("Congress did not intend to override state sovereign immunity when it enacted § 1983 . . . "). The State is not a party here, nor are its officials in their official capacity.

---

[19] 42 U.S.C. § 1983 was passed pursuant to the Fourteenth Amendment and there is congressional authority to pierce a State's sovereign immunity under that authority if that were relevant here. *Monell v. New York City Dep't of Soc. Serv.*, 436 U.S. at 700-701; *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

[20] One of the oft-repeated points that Petitioners make in support of this argument is that tribal courts historically "did not exist," or at least were unknown to non-Indians when Section 1983 was originally enacted in 1871. Pet. Br. at 7-8, 13-14, & 24-26. This point ignores "traditional tribal justice practices. . . . " which Congress has expressly recognized. The Indian Tribal Justice Act of 1993, 25 U.S.C. § 3631(4). It also ignores a fundamental rule of federal Indian law that tribes do not lose their sovereign powers by non-use. *See, e.g., Merrion*, 455 U.S. at 148 ("Without regard to its source, sovereign power, even when unexercised, is an enduring presence that. . . . will remain intact unless surrendered in unmistakable terms.").

Petitioners also argue that Congress has not expressly authorized tribal court jurisdiction over Section 1983 actions. Pet. Br. at 7; 24-26. As discussed above, this argument distorts the applicable rule. Inherent tribal sovereignty does not depend on a delegation of federal power. *Wheeler*, 435 U.S. at 328. Rather, the burden is on the party challenging inherent tribal sovereignty to show that Congress has expressly divested it. In *Iowa Mutual*, this Court rejected an argument that the federal diversity jurisdiction statute, 28 U.S.C. § 1332, implicitly divested a tribe's authority to adjudicate a civil tort case arising on a reservation and involving a non-Indian defendant.

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. 'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.'

480 U.S. at 18.

Moreover, despite the *Amici* States' argument to the contrary, *Amici* States' Br. at 6 & 16, it is established that "tribal courts, like state courts, can and do decide questions of federal law." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. at 486 n.7. That is a fundamental basis of the exhaustion rule. *National Farmers*, 471 U.S. at 852; *Iowa Mutual*, 480 U.S. at 16-18; *see also United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992) (holding that tribal court has jurisdiction over action under federal statute, 25 U.S.C.

§ 179, which provides penalties for trespass by livestock to tribal land); *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996); *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir. 1986), *cert. denied*, 476 U.S. 1117 (1986) (requiring exhaustion in tribal court of claims of conspiracy to deprive of civil rights); *see also* Br. of U.S. at 3 ("Congress has recognized tribal courts' jurisdiction to adjudicate important questions of federal law.").

Section 1983 is broadly remedial and must be so construed to effectuate its purpose of safeguarding federal rights. *Dennis v. Higgins*, 498 U.S. 439, 445 (1991); *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 700 (1978). Tribal courts are courts of general jurisdiction and if they decide to entertain such suits, they should be encouraged to do so.[21] *Cf. Howlett v. Rose*, 496 U.S. at 356 (state courts are required to entertain such actions if they are filed in a court of competent jurisdiction).[22] There is

---

[21] The Tribe's Code provides that the jurisdiction of the tribal court "shall extend to all territory within the present exterior boundaries of the Colony . . . including trust and non-trust land. . . . " Law and Order Code, § 1-20-010. The Civil Jurisdiction extends to "all civil causes of action, over persons, or things, arising or existing within the territorial jurisdiction of the court." *Id.* at 1-20-020.

[22] The arguable presence of alternative forums, *see Amici* States' Br. at 7, clearly does not preclude the existence of tribal jurisdiction. *See Williams v. Lee*, 358 U.S. at 222-223. Furthermore, it is an open question whether non-tribal forums could take jurisdiction over all of the claims present in the underlying actions. *See Snooks v. Ninth Judicial Dist. Court*, 919 P.2d 1064 (Nev. 1996) (state courts lack jurisdiction over on-reservation suit against tribal member). Assuming that they could not counsels in favor of tribal jurisdiction. Even assuming *arguendo* that there is concurrent jurisdiction, the fact that the

nothing in Section 1983 giving state courts jurisdiction, but their exercise of jurisdiction comports with the statute's remedial nature. This is no less true for tribal courts.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

KIM JEROME GOTTSCHALK
Counsel of Record
MELODY L. MCCOY
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760
Counsel for Respondents
the Tribal Court and the
Honorable Joseph Van Walraven

---

conduct and events most relevant to the underlying actions occurred within tribal territory, and that pertinent evidence and witnesses are likely to be there as well, makes tribal court the more appropriate forum.